thereof in the courts of the State to which they are taken for sale contrary to law; but that mere belief on the part of the vendor, that the purchaser buys for the purpose of carrying them into such other State to be there resold in violation of law, does not invalidate the sale, is not in the least shaken or impaired by the decision in the principal case. There can be no doubt that the contract in the principal case was a Massachusetts contract and hence valid in that State. But the principal case differs from *Hill* v. *Spear*, in the very important fact that the plaintiffs' authorized agent who solicited and took the orders from the defendant, was sent to New Hampshire to take such orders and knew the liquors were to be kept and sold by the defendant in New Hampshire, in violation of law; that the orders were transmitted by such agent to plaintiff, were accepted by him and became the basis of the contract in question; and also that both the soliciting and taking of such orders was an indictable offense. [*Brown* v. *Browning*, S. Ct. R. I., December 9, 1886, on a conflict of Sunday laws, and *Brown* v. *Finance Co.*, U. S. C. Ct. S. Dist. N. Y., May 11, 1887, on a conflict of usury laws, point out the distinction to be observed between immoral contracts and those simply forbidden.—*J. B. U.*]

In addition to *Hill* v. *Spear*, and the cases cited in the opinion in the principal case, the reader's attention is especially called to the leading case of *Holman* v. *Johnson*, Cowp. 341, decided by Lord MANSFIELD in 1775; *Gaylord* v. *Soragen*, 32 Vt. 110; *Aiken* v. *Blaisdell*, 41 Id. 656; *Territt* v. *Bartlett*, 21 Id. 184; *Adams* v. *Coulliard*, 102 Mass. 167; *Finch* v. *Mansfield*, 97 Id. 89; Story on Cont., § 625.

M. D. EWELL.

Chicago.

Supreme Court of Indiana.

THE MUNCIE NATIONAL BANK *v.* BROWN.

A notary public had, for several years, been using a seal of his own, but, in attesting the certificate of acknowledgment to the chattel mortgage involved in this action, used a seal belonging to another person. The designs of the seal were somewhat different, one of them bearing the words, "Notary Public, Seal, Indiana," the other bearing the words, "Notary Public, Delaware Co., Ind." *Held*, that the certificate was not invalidated, and that the mortgage was entitled to be admitted to record.

The mistake or wrong of a public officer, in placing a seal upon a certificate of acknowledgment, is not available under an answer of general denial, where the instrument is fair and perfect on its face.

A mortgagee has a right to a personal judgment and to a decree establishing his lien, although the mortgaged property is in the hands of a receiver.

A description of personal property, stating in general terms its character, and specifically stating in what building and rooms it is situated, is sufficient.

Under the statutes of Indiana, fraud is a question of fact, and a chattel mortgage cannot, as matter of law, be adjudged fraudulent because it contains

a provision authorizing the mortgagor to dispose of the property and account to the mortgagee.

A plaintiff who takes a personal judgment for the amount of his debt, does not merge the mortgage nor lose his right to subsequently foreclose it; but he may, on a subsequent day of the term, take a decree foreclosing the mortgage.

A creditor who accepts a second mortgage, which expressly recites that it is subject to a prior mortgage, is estopped to attack it on the ground that it was made to defraud creditors.

APPEAL from the Delaware Circuit Court.

A. D. Harris and *W. H. Calkins*, for appellant.

John W. Ryan, for appellee.

ELLIOT, J.—Cornelia A. Brown brought this suit to foreclose a mortgage on real and personal property, executed to her on the thirty-first day of January, 1885, by her husband, Francis M. Brown. The promissory notes, which the mortgage was executed to secure, bear date January 13, 1879; November 22, 1879; January 22, 1882; August 29, 1883; and September 13, 1884. The personal property is thus described in the mortgage: "The dry goods, carpets, hats, caps, clothing, notions, gentlemen's and ladies' furnishing goods, queensware, groceries, and all other goods, wares, and merchandise constituting the stock in trade heretofore owned by Francis M. Brown, and contained in the store-room and cellar belonging to and part of the west room on the street-grade floor, known as the 'Boyce Block,' on the north side of East Main street, in the city of Muncie, in said county and State, and also all of the wool, rags, feathers, and other country produce, and all of the show and display cases, and store furniture and fixtures, and gas fixtures, and all other property of whatever kind in said store-room, situate as aforesaid, and all of the promissory notes and book-accounts now owned by the said mortgagor, for indebtedness growing out of the mortgagor's mercantile business." It is recited in the mortgage, among other things, that "it is hereby stipulated, expressly, as the true intent of this mortgage, to prefer the said claim of the said Cornelia A. Brown as herein described, over and above all other of the said Francis M. Brown's indebtedness." There is also in the mortgage this agreement: "It is agreed and understood by and between the parties to this mortgage, that the said Francis M. Brown shall retain possession of

all of said merchandise and personal property hereby mortgaged, and may continue selling and disposing of the said mortgaged merchandise for cash, as heretofore, until all of said debts shall become due, or until such preference mortgagee, Cornelia A. Brown, shall demand possession thereof, which she may at any time hereafter do; but that said Francis M. Brown shall, at the end of each and every calendar month hereafter, fully and honestly account for all of the proceeds of such sales, and, after deducting therefrom necessary expenses of conducting such business, shall pay over the remainder to the mortgagee." Subsequent to the execution of the mortgage to the appellee, Francis M. Brown executed a mortgage to the Muncie National Bank, which it accepted with actual knowledge of the prior mortgage. The bank brought suit to foreclose its mortgage on the second day of February, 1885, and asked for the appointment of a receiver. In accordance with the prayer of the complaint, Marcus S. Claypool was appointed a receiver, and as such took possession of the store and goods. Cornelia A. Brown brought this suit after the bank had filed its complaint and secured a receiver. The mortgagor made default, and damages were assessed against him. After this had been done, the bank filed a cross-complaint, and, in conjunction with the receiver, filed a motion to set aside the default against Brown. At the same time, the other appellants were admitted to defend, and were allowed to assail the appellee's mortgage. The trial court sustained the motion to set aside the default as to Francis M. Brown, and entered an order setting it aside.

The first proposition argued by appellant's counsel is thus stated: "The mortgage was not entitled to be put of record, and therefore was never recorded." The argument, of which this proposition is the foundation, rests on the testimony of the notary public by whom the acknowledgment of Francis M. Brown was taken. From that testimony it appears, that the notary borrowed a seal in 1871, and used it in authenticating his official certificates, but did not use it in this particular instance. The seal which he attached to the certificate annexed to the appellee's mortgage was obtained at the office where the mortgage was written. The designs of the seals are somewhat unlike, and the words differently arranged. The words of one

are, "Notary Public, Seal, Indiana;" and those of the other are, "Notary Public, Delaware Co., Ind." It cannot be assumed that there was no seal, since there was a seal actually impressed upon the paper. On the face of the instrument, the certificate was perfect in form and in authentication. We cannot, therefore, hold that there was no acknowledgment. The utmost that can be asserted is, that the notary public did not do his duty as the law requires, by attaching the seal he was accustomed to use. He did, in fact, take the acknowledgment of the mortgagor; he did execute and sign the proper certificate; and he did affix a seal to the certificate. If the acknowledgment must be condemned, it is because the officer did wrong in using a seal not his own. No one can perceive how this breach of duty could have worked injury to any person in the world. Whether the one seal or the other was used, did not add to or take from the certificate any real efficacy. If the notary, two hours before the acknowledgment, had thrown away his old seal and adopted another, certainly no real harm to any person could have been done. Nor is it easy to see how the mere use of one seal instead of another, where both are mere general seals without any peculiar marks or names, could do anybody any harm. Courts ought not, as it seems to us, to strike down a mortgage for such a breach of duty, unless the law imperatively requires it. We cannot believe that the law requires such a result in a case where, as here, a notarial seal is used, although not the one the notary kept for use.

We have examined the cases of *Mason* v. *Brock*, 12 Ill. 273; *Buell* v. *Irwin*, 24 Mich. 153; *McKellar* v. *Peck*, 39 Tex. 381; *Hinckley* v. *O'Farrel*, 4 Blackf. 185; *Dumont* v. *McCracken*, 6 Id. 355; *Maxey* v. *Wise*, 25 Ind. 1; *Pope* v. *Cutler*, 34 Mich. 151, and *Wetmore* v. *Laird*, 5 Biss. 160, and our conclusion is that they are not of controlling force, for in none of those cases was the question presented as it is in the case before us. Here, a notarial seal was actually used, and the mistake of the officer consisted simply in using one not his own.

The case that most nearly approaches the present, is that of *McKellar* v. *Peck*, *supra*, where the seal of the clerk was used; but conceding that the decision there made was correct, which we doubt, it is obvious that it is not fully in point here. If

there had been no seal at all, or if the seal had not been an appropriate notarial seal, a very different question would confront us. Even in such a case, however, it is doubtful whether the error was a fatal one, since there are very respectable authorities justifying the conclusion that the mistake was one that might be cured by amendment: *Jordan* v. *Corey*, 2 Ind. 385; *Hunter* v. *Burnsville*, 56 Id. 223; *Arnold* v. *Nye*, 23 Mich. 293; *Sonfield* v. *Thompson*, 42 Ark. 46. If, however, we are wrong in our conclusions upon this point, it would not change the result, for it would not lead to a reversal. There was no pleading attacking the certificate of the notary public, and therefore no issue under which a defense founded on the use of another's seal in attesting the certificate was available. There is a seal attached to the certificate. It is the seal of a notary public, and it has no peculiar marks indicating that it was not the seal of the officer by whom it was used. It is a general seal, and such as our law recognizes as valid: *Lange* v. *State*, 95 Ind. 114. The presumption is that the officer did his duty, and this presumption is aided by the indications apparent on the face of the instrument. In order to entitle the parties assailing the mortgage, to avail themselves of any breach of duty on the part of the officer, it was necessary for them to affirmatively plead the facts constituting the breach.

It is true that the complaint avers that the mortgage was acknowledged and recorded, and that this averment is met by the general denial, but we do not think that this denial did more than require the plaintiff to produce an instrument showing on its face due execution, acknowledgment, and registry. The presumption in favor of the official acts of the notary, aided, as it was, by the indications on the face of the instrument, made a *prima facie* case. This *prima facie* case stands until overthrown: *Bates* v. *Pricket*, 5 Ind. 22. It cannot be overthrown, in any event, without some pleading attacking the conduct of the officer, since all that the general denial required of the plaintiff was the production of an instrument perfect on its face, and bearing the seal and signature of an officer, apparently regular and in due form. We have many analogous cases, in which it is held that an unverified general denial does no more than impose upon the plaintiff the duty of producing

an instrument perfect in form. These cases certainly apply where, as here, there is neither imperfection nor irregularity apparent on the face of the instrument, but where, in order to establish an irregularity, it is necessary to investigate the official acts of a public officer. The case, therefore, is much stronger than one in which the mistake or irregularity grows out of the acts of a party. It seems quite clear to our minds that such a field of investigation ought not to be opened without an affirmative pleading, challenging the conduct of the officer whose acts are assailed. Any other rule would defeat the purpose of our code, which, as is well known, is to require such pleadings as will fairly inform a party what he is expected to meet.

Counsel thus state their second proposition: "The decree for the sale of the property is void." The argument made in support of this proposition is that the property was in the hands of a receiver appointed by the court in the suit brought by the bank. Whatever of force there might be, if the point had first been appropriately made in the trial court, there is none in it as made in this court. It seems, indeed, that, under our decisions, the point would not have been well taken in the trial court. So far as the complaint demanded a personal judgment against the mortgagor, and a declaration of the lien of the mortgage, it was undeniably good: *Ohio, etc., Co.* v. *Nickless*, 71 Ind. 271; *Railroad Co.* v. *Mellett*, 92 Id. 537; *Gilbert* v. *McCorkle*, 110 Id. 215. But, however this may be, we regard it as clear, that the complaint cannot be successfully attacked by the assignment of errors on the ground that the property was in the possession of a receiver. The mortgagee undoubtedly had a right to a judgment, and to have her lien established, and to that extent, at least, if not to a much greater, her complaint was good. If good only to the extent stated, it would repel even a demurrer: *Bayless* v. *Glenn*, 72 Ind. 5. It certainly will, therefore, repel an attack made for the first time, after the finding.

The third proposition of counsel is this: "The mortgage is void for uncertainty; also, because it provides for continued possession." Although the proposition is in form single, in substance it is double. The first proposition refers to the description of the mortgaged property. The question involved has often been before this court, and descriptions much less

specific have been held sufficient: *Duke* v. *Strickland*, 43 Ind. 494; *Ebberle* v. *Mayer*, 51 Id. 235; *Burns* v. *Harris*, 66 Id. 536; *Zehner* v. *Aultman*, 74 Id. 24. These decisions are well sustained. The authorities are collected in an article in 24 Cent. Law J. 339, where many cases very like the present, will be found. The second proposition involved in the general statement, is based upon cases which hold, that where a mortgage clothes the mortgagor with authority to retain possession of the property and sell it in the ordinary course of business, it is fraudulent and void as to creditors. It is quite doubtful whether the mortgage of the appellee falls within those cases, since it provides that sales shall be made for the benefit of the mortgagee; but we need not discuss this question, for, under our statute, fraud is a question of fact, and cannot be decided upon the face of a mortgage authorizing the mortgagor to sell the mortgaged property. We cannot hold that a provision in a chattel mortgage, vesting the right of disposition in the mortgagee, vitiates the mortgage, for our statute and our decisions declare a very different rule: *McLaughlin* v. *Ward*, 77 Ind. 383; *Morris* v. *Stern*, 80 Id. 227; *McFadden* v. *Hopkins*, 81 Id. 459; *Louthain* v. *Miller*, 85 Id. 161; *Berghoff* v. *McDonald*, 87 Id. 549; *McFadden* v. *Fritz*, 90 Id. 590; *Dessar* v. *Field*, 99 Id. 548; *Stix* v. *Sadler*, 109 Id. 254.

The fourth proposition of counsel is thus expressed: "Taking personal judgment for $15,490, merged the suit into that judgment." We cannot assent to this doctrine. We know of no principle upon which it can be held, that a party who sues on a note and mortgage, is precluded from obtaining a decree of foreclosure, by taking a judgment for the amount due, in a case where the decree for the foreclosure is prevented by the interposition of intervening creditors. We concede as broadly as can be claimed, the rule that a party cannot split his demands, but must recover in one action: *Crosby* v. *Jeroloman*, 37 Ind. 277; *City* v. *Hudnut*, [S. Ct. Ind., November 1, 1887,] and cases cited. But there was here no splitting of demands. There was one suit, and all the damages were assessed, so that the rule can have no application. We suppose it to be well settled, that a personal judgment may be taken on a promissory note, secured by a mortgage, in an independent action, and that a foreclosure

of the mortgage may be secured in a subsequent suit. We cannot conceive why a plaintiff cannot enter a personal judgment on one day of the term, and on a subsequent day enter a decree of foreclosure, even in a case where the decree is not postponed by the action of intervening creditors. The judgment merges the cause of action so that no second judgment can be obtained; but it does not merge the mortgage security. The authorities go so far as to hold that the decree of foreclosure does not merge the lien of the mortgage, although it merges the mortgage as a cause of action: *Teal* v. *Hinchman*, 69 Ind. 379; *Evansville, etc., Co.* v. *State*, 73 Id. 219; *Manns* v. *Bank*, Id. 243–246; *Pence* v. *Armstrong*, 95 Id. 191–207; *Curtis* v. *Gooding*, 99 Id. 45–51. But here, there was no decree of foreclosure, so that there was not even a merger of the mortgage as a cause of action, and surely the lien continued until foreclosed. If the lien continued until foreclosed, then it is not possible that it could have been merged by a simple personal judgment. A personal judgment cannot drown the mortgage security; nothing but a decree of foreclosure can do so much; and until this drowning takes place there can be no merger. A personal judgment does not extinguish the mortgage lien, and, until extinguished, it is enforceable by a decree. Counsel loose sight of the fact that, in every case like this, there are two distinct things, a debt, and the mortgage securing it. A personal judgment does not extinguish the debt, although it merges it as a cause of action. But, while there is a merger of the debt in the personal judgment, the lien of the mortgage remains unaffected. The mortgage will sustain a suit for a decree of foreclosure, although there may be a personal judgment. Until there is a foreclosure, there is no judgment merging, or even impairing, the mortgage security.

The trial court sustained the motion of the appellee to strike out all evidence tending to prove that the mortgage executed to the appellee, was fraudulent. The Muncie National Bank is not in a situation to complain of this ruling, for in the mortgage which it accepted, that executed to the appellee is recognized as valid. It is recited in the former mortgage that "it is expressly stipulated herein, that this mortgage is made second and subsequent to that of one executed to Cornelia A. Brown and John C. Jenners to secure the payment of certain of the indebt-

edness of the said Francis M. Brown to them and each of them, as described in said mortgage." Having treated the mortgage as a valid one, the bank cannot be allowed to assail it on the ground that it was made with the intent to defraud creditors: *Rennick* v. *Bank*, 8 Ohio, 535; *Irwin* v. *Longworth*, 20 Id. 581; Bump, Fraud. Conv. 465.

The cross-complaint is good as against Francis M. Brown. It is not good as against the appellee, so far as it attempts to charge her with fraud; but it is good, in so far as it shows that she claimed an interest in the property in controversy. The demurrer to it was therefore properly overruled. But, in overruling this demurrer, the trial court did not decide that it would receive evidence tending to prove that the mortgage was executed to defraud creditors. A court, in passing upon a demurrer, does not decide in advance, what evidence will or will not be received; nor is a court bound to adhere to its decision, for it is well settled that it may reconsider a ruling on demurrer and rectify an error. It cannot, therefore, be justly assumed that the court misled the appellants. A party who files a bad pleading, and not the court, is in fault. The appellants were in fault in not making their cross-complaint sufficient for all that they desired it to accomplish; and we cannot conceive how the trial court can, with justice, be censured for not giving them more than their pleading entitled them to demand. As there was no pleading entitling the appellants to introduce the evidence struck out, we cannot condemn the ruling of the trial court.

Judgment affirmed.

Why a seal is required. In *Mason* v. *Brock*, 12 Ill. 273, a notary public used a mere scroll, and this was held not sufficient. In passing upon the question, the court said, "In our opinion, the certificate of the notary is fatally defective. The statute imperatively requires it to be under his official seal. It makes the affixing of the official seal an indispensable part of the certificate. Without the seal, the certificate is incomplete and imperfect. It has no validity or efficacy, unless the seal is added. It might as well be insisted, that a writ of error issued from this court, which was not under the seal of the court, would be valid, or to say that a certificate of acknowledgment by a notary need not be evidenced by his notarial seal. The same authority that requires the process to be under the seal of the court, directs the certificate to be under the official seal of the notary. The courts have no more power to dispense with the requirements of the statute in the one case than in the other. It is only by the force of the statute, that the

certificate of a notary has any effect, as evidence of the execution of a deed; and the statute requires it to be under the official seal of the officer. A certificate, which is not verified by his seal of office, derives no force or efficacy from the statute. We cannot say that the seal is a mere formality that adds nothing to the dignity or solemnity of the instrument. It is enough that the law positively requires it. The propriety of the requisition rests with the legislature. A notary is empowered to take the acknowledgment of a deed and certify the same under his official seal. He has no power to do it in any other manner. If he has no notarial seal, with which to authenticate his official acts, he is destitute of any authority to certify the acknowledgment of a deed. He must procure an official seal, before the authority, conferred on him to take the acknowledgment of deeds, attaches. He cannot make use of a scroll or private seal for the purpose of authenticating a certificate of acknowledgment. The provisions of law allowing certain officers to use private seals until they should be provided with public seals, had no application to a notary. He has to provide himself with an official seal. It is not furnished him by the public. The statute is silent as to the form and character of the seal. He may adopt a seal, with such an inscription as his judgment may dictate or his fancy suggest. It must, however, be capable of making a definite and uniform impression on the paper on which the certificate is written, or on some tenacious substance attached thereto, so that when a question arises as to the genuineness of an authentication, it may be determined by reference to the seal in the possession of the officer." Consequently the acknowledgment of a deed by a married woman, not having been attested by the seal of a notary, was held invalid. (See also, citations, *infra.*)

Kind of seal. A notary public cannot use a court seal to authenticate his official acts: *McKeller* v. *Peck*, 39 Texas, 381. The purpose of his having a seal, is to authenticate his acts, and there is no other reason for his having one: *Stephens* v. *Williams*, 46 Iowa, 540; see *Tunis* v. *Withrow*, 10 Id. 305. The seal must be such as will make a distinct impression upon paper; and a mere scroll in ink upon the paper or wafer, is not sufficient: *Stephens* v. *Williams*, 46 Iowa, 540; citing *Gage* v. *Dubuque & Pacific R. R.*, 11 Id. 310; *Hinckley* v. *O'Farrell*, 4 Blackf. 185; *Mason* v. *Brock*, *supra*; *Richard* v. *Boller*, 6 Daly, 460; s. c. 51 How. Pr. 371; and the certificate of a county clerk, who is authorized to certify to the official character of the notary, will not cure the absence of his seal from his certificate: *Stephens* v. *Williams*, *supra*. A printed seal is of no effect: *Richard* v. *Boller*, *supra*; *Ross* v. *Bedell*, 5 Duer, 462. Concerning the form of the seal, see the quotation, *supra*, from *Mason* v. *Brock*.

In *Collins* v. *Boyd*, 5 Dana, 316, it was held, that an officer might affix to a certificate of acknowledgment, a seal which he was accustomed to use as his official seal, though he described it in the attestation clause as "his private seal," no seal of the office having been provided.

In *Lange* v. *State*, 95 Ind. 114, the seal used had the following only upon it: "Notary Public, Seal, Indiana." The statute required "such a seal as will stamp upon paper, a distinct impression, in words or letters sufficiently indicating his official character, to which may be added such other device as he may choose." The court

held the seal sufficient, saying: "We think the seal does indicate the official character of the officer, and that is all the statute requires. The statute does not require that the seal shall state the name of the county in which the notary resides or for which he was appointed." See *Pierce* v. *Indseth*, 106 U. S. 546.

J. P.'s seal. A justice of the peace is not required to use anything but a scroll; and there is no presumption that he has an official seal: *Dumont* v. *McCracken*, 6 Blackf. 355.

"*Given under my hand and official seal.*" It is not necessary to state that the certificate is given under his hand and seal, when the seal and signature are in fact affixed: *Harrington* v. *Fish*, 10 Mich. 415. Nor is it necessary to say it was given under an "official" seal, if the notarial seal is in fact affixed; "under seal" being sufficient: *Moore* v. *Titman*, 33 Ill. 358; *Monroe* v. *Arledge*, 23 Texas, 478: *Contra*, *Wetmore* v. *Laird*, 5 Biss. 160. Where the phrase used was "Given under my hand of office," it was held sufficient; for every person must know what was meant: *Nichols* v. *Stewart*, 15 Texas, 226.

The use of wax. "Formerly, wax was the most convenient and the only material used to receive and retain the impression of the seal. Hence it was said: *Sigillum est cera impressa; quia cera, sine impressione, non est sigillum.* But this is not an allegation that an impression without wax is not a seal, and for this reason courts have held that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of '*cera impressa.*' If, then, wax be construed to be merely a general term, including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machines now used to impress public seals, do not require any soft adhesive substance to receive or retain their impression. The impression made by such a power on paper, is as well defined, or durable, and less likely to be destroyed or defaced by vermin, accident or intention, than that made on wax. It is the seal which authenticates and not the substance on which it is impressed; and when the court can recognize its identity, they should not be called upon to analyze the material which exhibits it:" *Pillow* v. *Roberts*, 13 How. 472. This was said of a court's seal.

Of a Norway notary's seal, it was said: "The use of wax or some other adhesive substance, upon which the seal of a public officer may be impressed, has long ceased to be regarded as important. It is enough, in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper itself, in such a manner as to be readily identified upon inspection:" *Pierce* v. *Indseth*, 106 U. S. 546.

Place to attach seal. "If the certificate be 'under his hand and seal of office,' it is sufficient, and it cannot be of any importance where the seal is affixed. It may be at the beginning, at the end, or anywhere upon the margin, or it might be appended by a ribbon, after the manner of the sealing of ancient charters. The officer is not required to certify to the sealing, but it is sufficient if the seal be, in fact, affixed and the name signed. Unquestionably, therefore, if the seal had been placed where it is, and the signature only at the bottom of the last part of the certificate, the whole would have been sufficiently verified. I do not think it is any less so by reason of the words '*in testimonium veritatis*,'

with the signature opposite the seal, between the two parts of the certificate. The whole may, with propriety, be regarded as one certificate, once sealed and twice signed. I adopt this conclusion the more readily, because the objection is merely formal; the certificate, in its present form, furnishing all the security against error, and imposing upon the notary all the responsibility which it would do if another seal were added. * * * * The case most nearly resembling the present, of any to which our attention has been called, is that of *The State* v. *Coyle*, 33 Me. 427. In that case, a complaint and justice's warrant in pursuance of it, were written on the same piece of paper, and the only seal was at the end of the justice's signature to the complaint, the warrant being written beneath it. It was held that the warrant was sufficiently sealed. These authorities, particularly the last, justify the admission of the certificate of the notary, especially as such certificate furnishes presumptive proof only of the facts contained in it, concluding neither of the parties:" *Olcott* v. *Tioga R. R. Co.*, 27 N. Y. 546; affirming 40 Barb. 179.

Recording seals. Necessarily deeds and mortgages must be acknowledged before an officer authorized to take the acknowledgment, and if he have a seal, he must affix it to his certificate of acknowledgment. When the deed or mortgage is recorded, it is difficult or impossible, in fact, to record the impression made by the seal. What effect has this on the record? Said the court, in *Griffin* v. *Sheffield*, 38 Miss. 359, "the statute of registration does not contemplate the recording of the impression of a public seal; and hence it is no objection to the admission in evidence of a certified copy of a recorded deed, that a copy of the impression of the official seal of the officer who took the acknowledgment of the grantor does not appear on it, if it be stated in the body of the certificate of acknowledgment that it was certified under such official seal." In *Smith* v. *Dall*, 13 Cal. 510, it was held that the omission, in the record of a deed, to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record; but that it is "enough if it appear from the record that the instrument copied is under seal." See *Jones* v. *Martin*, 16 Cal. 165. In *Putney* v. *Cutler*, 54 Wis. 66, whilst citing the cases, it was said: "Whether we would be justified in going to the extent of these decisions, may be doubtful. It has certainly been held by other courts, that 'when the record of a deed does not show a copy of the seal as such copies are usually made in records, the presumption is that there was no seal on the original.' In the case at bar, the record does not 'show a copy of the seal as such copies are usually made in records,' and hence it must be proved that the corporate seal was upon each of the original deeds in question." See *Huey* v. *Van Wie*, 23 Wis. 613.

Proving seal. The seal of a court of admiralty, like a national seal, proves itself. Accordingly, the record of a court of vice-admiralty, in Bermuda, purporting to be certified by the deputy registrar, under the seal of the court, was held admissible in evidence, without other proof of authenticity. In passing on the question, the court said: "The decree of vice-admiralty admitted by the judge, purported to be under the seal of the court, and to be certified by the deputy registrar. It is contended by the defendant that the record was not duly authenticated. I am of a different opinion. The decisions relative to the adjudications of foreign muni-

cipal courts must be laid out of the question. The seals of such courts are never judicially recognized, but must be proved: *Anon.*, 9 Mod. 66; *Henry* v. *Adey*, 3 East. 221; *Collins* v. *Mathew*, 5 Id. 473. The cases of *Delafield* v. *Hand*, 3 Johns. 310; and *Church* v. *Hubbart*, 2 Cranch, 187, are also of this description. By common consent and general usage, the seal of admiralty has been considered as sufficiently authenticating its records. No objection has prevailed against the reception of the decree of a court acting on the law of nations, when established by its seal. The seal is deemed to be evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested as a party: *Green* v. *Waller*, 2 Ld. Raym. 893; Peake's Ev. 74; Swift's Ev. 7; *The Maria*, 1 Rob. Adm. 340. The case of *Yeaton* v. *Fry*, 5 Cranch, 335, is not adverse to this proposition. The seal of the vice-admiralty court was not proved by extrinsic evidence. No stress could have been put on the testimony of a witness that he had once received from his proctor a copy of the proceedings in the said court under a similar seal, or that similar papers had, by insurers and others, been considered authentic. Such evidence was too feeble to establish the fact for which it was adduced on any reasonable foundation. The seal then proved its own authenticity. 'Assuming the seal to be genuine,' said GOULD, J., in *Griswold* v. *Pitcairn*, 2 Conn. 91, 'the fact (that it was affixed by a proper officer) must, of course, be proved, unless the contrary is shown. For any higher evidence of the fact appearing upon the face of the record, than the seal itself imports, is impossible, and to require extrinsic evidence of it, would be to subvert the rule itself, that a national seal is the highest proof of authenticity.' These remarks are applicable to the seal of a court of admiralty, and for this obvious reason, because, equally with a national seal, it proves itself. As to *Gardere* v. *Columbia Ins. Co.*, 7 Johns. 514, it professedly waives the question before the court. The seal in that case has (had) been proved by extrins c evidence. 'It is, therefore,' said YATES, J., who delivered the opinion of the court, 'unnecessary to notice the distinction urged in the argument, between foreign municipal tribunals and courts of admiralty.'"

Authentication under a private seal is of no effect: *Church* v. *Hubbart*, 2 Cranch, 187.

In *Yeaton* v. *Fry*, 5 Cranch, 335, it was held, that copies of the proceedings of the vice-admiralty court of Jamaica, are admissible in evidence, when certified under the seal of the court, by the deputy registrar, who was certified to by the judge of the court, and he by a notary public.

Proof of the official character of a notary public is not necessary. "By the customary law of nations, as well as the law merchant, the official acts of a notary public are authenticated by his seal:" *Dunn* v. *Adams*, 1 Ala. 527; and his certificate under his notarial seal is *prima facie* evidence that he is a notary duly commissioned: *Browne* v. *Philadelphia Bank*, 6 S. & R. 484.

Judicial notice of seals. Courts will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world: *Pierce* v. *Indseth*, 106 U. S. 546; citing *Townsley* v. *Sumrall*, 2 Pet. 179; *Chanoine* v. *Fowler*, 3 Wend. 173; *Carter* v. *Burley*, 9 N. H. 559; *Hulliday* v. *McDougall*, 20 Wend. 81. See also *Anon.*, 12 Mod. 345; *Wright* v. *Barnard*, 2 Esp. 700; *Yeaton* v. *Fry*, 5 Cranch, 335; *Browne*

v. *Philadelphia Bank*, 6 S. & R. 484; *Porter* v. *Judson*, 1 Gray, 175; *Hutcheon* v. *Mannington*, 6 Ves. 823; *U. S.* v. *Libby*, 1 Wood & M. 221. So courts will take judicial knowledge of the great seal of a foreign country: *United States* v. *Johns*, 4 Dall. 416; *The Santissima Trinidad*, 7 Wheat. 283; *Anon.*, 9 Mod. 66; *Lincoln* v. *Battelle*, 6 Wend. 475; *United States* v. *Wagner*, L. R. 2 Ch. Ap. 585; *Griswold* v. *Fitcairn*, 2 Conn. 85; *Church* v. *Hubbart*, 2 Cranch, 187. But the courts will not judicially notice the seal of a government which has not been recognized by the sovereign power of the country under which those tribunals are constituted: *City of Berne* v. *Bank of England*, 9 Ves. 347; *United States* v. *Palmer*, 3 Wheat. 610. Such a seal may, however, be proven by the evidence of witnesses: *United States* v. *Palmer*, 3 Wheat. 610, 634; *The Estrella*, 4 Id. 298. See *Hatfield* v. *Jameson*, 2 Munf. 53, 70, 71.

So, as we have elsewhere seen, foreign admiralty and maritime courts, being the courts of the civilized world, and of co-ordinate jurisdiction, are judicially recognized, and their seals need not be proved: *Croudson* v. *Leonard*, 4 Cranch, 435; *Rose* v. *Himely*, 4 Id. 241, 292; *Church* v. *Hubbard*, 2 Id. 187; *Thompson* v. *Stewart*, 3 Conn. 171; *Green* v. *Waller*, 2 Ld. Raym. 891; *Anon.*, 9 Mod. 66.

So courts of this country will recognize the seal of a court in a sister State, when the certificate of its clerk or prothonotary is authenticated by the presiding judge thereof: *Clark* v. *Depew*, 25 Pa. St. 509; *Coffee* v. *Neely*, 2 Heisk. 304. If there be no seal, the fact should be stated in the certificate of the clerk or judges; for the courts always presume that another court has a seal, unless it is a domestic court: *Kirkland* v. *Smith*, 2 Mart. (La.) N. S. 497; *Alston* v. *Taylor*, 1 Hayw. 385. In such a case, the seal should be affixed to the clerk's certificate, rather than to the judge's authentication: *Turner* v. *Waddington*, 3 Wash. C. C. 126.

The validity of a seal may always be contested: *Nicholls* v. *Webb*, 8 Wheat. 326; *Dickens* v. *Beal*, 10 Pet. 582; *Mullen* v. *Morris*, 2 Barr. 86; *Bradley* v. *Northern Bank*, 60 Ala. 258; *Donegan* v. *Wood*, 49 Id. 251.

Notarial seals. A notary public was an officer known to the common law, and to be one using a seal. It will be presumed, therefore, in the absence of proof, that the common law is in force in another State of the Union, and that a notary acting there has a seal. If the seal is not attached to his certificate, it will be invalid and of no force in evidence: *Dumont* v. *McCracken*, 6 Blackf. 355.

This, however, is rather a harsh rule to enforce against a foreign notary; for it is well known that in several States notaries act without seals, and are not required to keep them.

It is the general rule that a notary can act only by and through his seal, and in the absence of it, his acts or statements cannot be proven by his certificate: *Rindskoff* v. *Malone*, 9 Iowa, 540; *Grand Rapids* v. *Hastings*, 36 Mich. 123; *Wedel* v. *Herman*, 59 Cal. 507; *Jowers* v. *Blandy*, 58 Ga. 383.

For this reason, a deposition will be suppressed, unless it bears the official seal of a notary: *Stephens* v. *Williams*, 46 Iowa, 540. So, an affidavit: *Tunis* v. *Withrow*, 10 Iowa, 305; *Stephens* v. *Williams*, 46 Id. 541; *Stone* v. *Miller*, 60 Id. 249; *Hinckley* v. *O'Farrel*, 4 Blackf. 185. See *Smith* v. *Bondurant*, 74 Ga. 416; *Cary* v. *State*, 76 Ala. 78.

Where a statute made the execution, acknowledgment, and proper certi-

ficate of a notary essential to the conveyance of an estate of a married woman, the absence of his seal was held to render such conveyance void; for the statute must be strictly pursued: *Ewald* v. *Corbett*, 32 Cal. 493; *Barrett* v. *Tewksbury*, 9 Id. 14; *Hastings* v. *Vaughn*, 5 Id. 315. Such a certificate, it was held, could not be corrected by the notary, nor by a court of equity, even though she received, with her husband, a valuable consideration for the land conveyed: *Barrett* v. *Tewksbury*, *supra*; *Bours* v. *Zachariah*, 11 Cal. 281.

In Wisconsin, it was said of a notary: "It is true that he did not affix his official seal; but it has frequently been held under similar statutes, that the certificate of acknowledgment need not be authenticated by the notarial seal." That was said of the acknowledgment of the execution of a deed taken by the notary: *Maxwell* v. *Hartman*, 50 Wis. 660; citing *Farnum* v. *Buffum*, 4 Cush. 260; *Learned* v. *Riley*, 14 Allen, 109; *Baze* v. *Arper*, 6 Minn. 220; *Thompson* v. *Morgan*, Id. 292; *Fund Commissioners of Muskingum Co.* v. *Glass*, 17 Ohio, 542.

Where a notary public had failed to affix his seal to a protest, it was held, that he "had the right at the time (of the objection to its admission in evidence) to affix his seal, and thus every difficulty would have been obviated;" and that a general objection to the reception of the protest in evidence, was non-availing, the absence of a seal must have been specifically pointed out if relied upon: *Rindskoof* v. *Malone*, 9 Iowa, 540.

So where a notary took a deposition and failed to attach his seal to the certificate, he could amend by attaching his seal thereto, and the deposition could then be used in evidence: *Chapman* v. *Allen*, 15 Texas, 282.

A statute provided that "no notarial act shall be valid unless the seal of office be appended." A notary affixing the seal of the county court, instead of his notarial seal, to the certificate of acknowledgment of a married woman and her husband; it was held, that the certificate had no validity whatever until his seal of office was affixed, and that the *feme covert* was at liberty to retract her acknowledgment, in any manner she saw proper, *at any time prior to such seal being affixed*: *McKellar* v. *Peck*, 39 Texas, 381.

That a seal of the notary is essential to the validity of his act, see *Richards* v. *Randolph*, 5 Mason, 115; *Little* v. *Dodge*, 32 Ark. 453 *Booth* v. *Cook*, 20 Ill. 129; *Holbrook* v. *Nichol*, 36 Id. 161; *Miller* v. *Henshaw*, 4 Dana, 325; *Kemper* v. *Hughes*, 7 B. Mon. 255; *Buel* v. *Irwin*, 25 Mich. 145; *Duncan* v. *Duncan*, 1 Watts, 322; *Barney* v. *Sutton*, 2 Id. 31; *McCreary* v. *McCreary*, 9 Rich. Eq. 34; *Ballard* v. *Perry*, 28 Texas, 347; *Texas Land Co.* v. *Williams*, 51 Id. 51.

In a number of cases, however, it has been held that a seal is not essential to the validity of a certificate of acknowledgment taken by a notary, as elsewhere stated, unless required by an express statute: *Powers* v. *Bryant*, 7 Port. (S. C.) 9; *Harrison* v. *Simons*, 55 Ala. 510; *Irving* v. *Brownell*, 11 Ill. 402; *Thompson* v. *Robertson*, 9 B. Mon. 383; *Farnum* v. *Buffum*, 4 Cush. 260; *Thompson* v. *Morgan*, 6 Minn. 292; *Fund Commissioners* v. *Glass*, 17 Ohio, 542; *Jaques* v. *Weeks*, 7 Watts, 261; *Second National Bank* v. *Chancellor*, 9 W. Va. 69.

Where the officer had failed to attach his seal to the jurat of a deed of assignment, and both parties, acting in good faith, supposed the deed was properly acknowledged, he was allowed to attach his seal even after his

term of office had expired: *Smith* v. *Bondurant*, 74 Geo. 416; see *Cary* v. *State*, 76 Ala. 78.

Executions. In *The Ætna Insurance Company* v. *Stoddard*, 6 Wall. 556, an order of sale on a decree of foreclosure of a mortgage, was issued by the clerk of the court without the seal of the court attached. The instrument was a mere copy of the decree with the clerk's certificate without the seal of the court appended, certifying that it was a true copy of the original. In an action of ejectment, this certified copy was offered in evidence by the defendant, who claimed under the sale made by the sheriff under this copy. The court refused to allow it in evidence, and gave judgment for the plaintiff, who was the judgment defendant in the decree, or one claiming under him. On appeal, the judgment was affirmed. The statute authorizing a sale by virtue of a copy of the decree, provided that "a copy of the order of sale and judgment shall be issued and certified by the clerk under the seal of the court to the sheriff, who shall thereupon proceed to sell the mortgaged premises," etc. The court said: "Though the order of sale here described may not come under the name of any of the recognized common law writs of execution, as *capias*, *fieri facias*, or others yet it comes clearly within the function and supplies the purpose of an execution, that is, a process issuing from a court to enforce its judgment. The statute recognizes it as such, and requires that it shall issue under the seal of the court. The sheriff to whom it is directed, is required to proceed 'as upon execution.' If the debt is not satisfied by the sale of the property specifically mentioned in the order, it then operates as a *fieri facias*, under which the sheriff is directed to levy the residue, of any other property of the defendant. It is, therefore, to all intents and purposes an execution, and the statute expressly requires that it must issue under the seal of the court. Without the seal it is void. We cannot distinguish it from any other writ or process in this particular. It is equally clear that under the Indiana statute, the sheriff could not sell without this order, certified under the seal of the court, and placed in his hands. This is his authority, and if it is for any reason void, his acts purporting to be done under it, are also void." This was a case from Indiana, and the Supreme Court refused to follow it in *Rose* v. *Ingram*, 98 Ind. 276. Other courts have decided that the seal upon an execution is matter of substance and not amendable: *Bailey* v. *Smith*, 12 Me. 196; *Tibbetts* v. *Shaw*, 19 Id. 204; *Witherel* v. *Randall*, 30 Id. 168; *Hall* v. *Jones*, 9 Pick. 446; *Swett* v. *Patrick*, 2 Fairf. 179; *Hutchins* v. *Edson*, 1 N. H. 139; *Shackleford* v. *M'Rea*, 3 Hawks. 226; *Seawell* v. *Bank of Cape Fear*, 3 Dev. 279; *Boal* v. *King*, 6 Ohio, 11. Where, after the lapse of a long period, a writ is offered in evidence, a very slight and indistinct impression will be presumed to have been made by a seal: *Heighway* v. *Pendleton*, 15 Ohio, 755.

"So long as a seal is required to be affixed to writs and executions, though we may not be able to discover its real use, yet we must not dispense with what the law requires:" *Porter* v. *Haskell*, 11 Me. 177, quoted in *State* v. *Flemming*, 66 Id. 142.

A distinction has sometimes been made between original and judicial writs, using the latter term to distinguish such writs as issue during the progress of a suit from those by which suits are commenced. And it has been said, that while executions and other strictly judicial writs may be amended

by having the seal of the court affixed to them, original writs cannot be thus amended. This is the distinction referred to, in *Bailey* v. *Smith*, 12 Me. 196; and see *Sawyer* v. *Baker*, 3 Id. 29, but which was overruled in *Porter* v. *Haskell*, 11 Id. 177, and disapproved in *State* v. *Flemming*, 66 Id. 142.

The Supreme Court of Indiana refused to place the construction, upon the statute in force in that State with reference to issuing executions, which was placed upon it in the case of *The Ætna Insurance Co.* v. *Stoddard*, 6 Wall. 556. It held, that the statute of 8 Henry IV, c. 12, authorizing the amendment of "writs," was in force in that State, and authorized the affixing of the seal, by the clerk, after a sale of the property. "There are cases which hold, that writs without a seal are not void, but voidable only, and that they may be amended, after they have been served, by attaching the seal. We incline to follow that line of decisions which holds, that process, without the proper seal, is voidable only, and therefore amendable, as being more in consonance with the general spirit of the law, which regards substance more than form. Much hardship and injury might accrue to purchasers of property on execution or their vendees, if the sale happened to be made on an execution to which the seal, by inadvertence of the clerk, had not been affixed, if the defect could not be amended by affixing the seal:" *Hunter* v. *The Burnsville Turnpike Co.*, 56 Ind. 213. So, in *Purcell* v. *McFarland*, 1 Iredell's L 34, it was held, that where the clerk of a superior court had omitted to affix the seal to writs of *fi. fa.* and *vend. ex.* the court might, at a subsequent term, order the clerk to affix the seal to the executions, *nunc pro tunc*, in order to protect the purchaser of land sold under them. See also *Clark* v. *Hellen*, 1 Iredell's L. 421. In *Arnold* v. *Nye*, 23 Mich. 286, Judge COOLEY said: "The want of a seal, if one was really wanting, might have been supplied on motion to amend, and did not render the execution void." Other cases are to the same effect: *Jackson* v. *Brown*, 4 Cow. 550; *People* v. *Dunning*, 1 Wend. 16; *Ross* v. *Luther*, 4 Cowen, 158; *Dever* v. *Akin*, 40 Ga. 429; *Bridewell* v. *Mooney*, 25 Ark. 524; *Corwith* v. *State Bank of Illinois*, 18 Wis. 560; *Sabin* v. *Austin*, 19 Id. 421; *Rose* v. *Ingram*, 98 Ind. 276. Freeman prefers the latter line of cases: Freeman on Executions, §§ 46 and 70.

If the rights of innocent purchasers would be affected by the amendment, it would, perhaps, not be allowed: *Purcell* v. *McFarland*, 1 Iredell's L. 35.

Summons. In Indiana the code provides that "no summons, or service thereof, shall be set aside, or adjudged insufficient, when there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court." A summons was issued and served, without the seal of the court out of which it was issued, and it was held, that this was not a good cause for a review of the judgment. The summons was not void, "though perhaps voidable, and therefore amendable, and that, until set aside in a proper application for that purpose, they and each of them may well be held to be sufficient. The court below, of its own motion, or upon the motion of any interested party, may at any time cause the proper seal to be affixed to the summons, and thus validate and render it effectual *ab initio*, for all purposes:" *Boyd* v. *Fitch*, 71 Ind. 306. The court has the right to order the clerk to affix the seal *nunc pro tunc*, to such a summons issued previous to, and re-

turnable at, a former term, after judgment has been entered and after the term has closed: *The State* v. *Davis*, 73 Ind. 359.

Other courts, however, hold such powers void, and all proceedings thereunder also void: *Woolford* v. *Dugan*, 2 Ark. 131. See *Williams* v. *Vanmetre*, 19 Ill. 293; *Wheaton* v. *Thompson*, 20 Minn. 196; *Reeder* v. *Murray*, 3 Ark. 450.

Venire for grand jury. In Maine it was held, that if a venire issue for a grand jury without the seal of the court, a plea setting up such facts is sufficient to abate the indictment, and the defect, or absence of the seal, is one which cannot be cured by amendment, nor can it be remedied by a special statute, passed for that purpose. The court said: "Is the defect amendable? We think not. Every indictment to be valid, must be found by a grand jury legally selected, and competent to act at the time the indictment is found. To put the seal upon these venires now would not make sealed instruments of them at the time they were served. They have performed their office and are *functi officio*. To seal them now and then hold that they were legal instruments when served, and when they had no seals upon them, would seem more like trifling than the performance of a grave and important duty." The statute in question applied only to those venires issued from a particular court of a particular county at a particular term. It was held that the effect of the act was to render valid an invalid indictment already found; and was also a suspension of the general law of the State for individual cases or a particular locality. For both reasons the act was void. Such an act is, in principle, as objectionable as a bill of attainder, or an *ex post facto* law: *State* v. *Flemming*, 66 Me. 142.

Writs of attachment. In *Foss* v. *Isett*, 4 G. Green (Ia.), 76, a writ of attachment was issued by the clerk of the court without the seal of the court, and on motion to amend the writ by attaching the seal, the court allowed it; but on appeal, this was held error sufficient to reverse the law. "Before the property of the defendant could be seized, it was indispensable that the plaintiff should obtain a writ. A paper issued by the clerk in the form of a writ is no writ, unless it has impressed upon it the seal of the court from whence it issues. Without this seal, it is no more for the purpose of a writ than blank paper. Could it be amended? Not at all; for there is nothing to amend. It lacks the essential ingredient of a writ, and is not amendable. It is the seal, other things being right, which makes it a writ, gives it force, efficacy, and life. The property which had been seized upon this void paper, could not be held in custody upon a writ issued after it was attached, which would be the case if the seal could be subsequently affixed. The numerous authorities cited by the counsel for appellee are not applicable to the question presented by this record. Neither are the provisions of the code broad enough to cover the case. This was not properly an amendment which was proposed. It was the creation of a new writ. This could be done, but not so as to operate retrospectively upon any prior proceedings. With the seal, it became for the first time a writ, and the party to make it available should proceed upon it *de novo*." See *Barber* v. *Swan*, 4 G. Green (Ia.), 352.

Foss v. *Isett*, *supra*, was followed in *Shaffer* v. *Sundwall*, 33 Iowa, 579, where it was held that a writ issued from the *Circuit* court having the seal of the *District* court impressed upon

it, was void, and the defect could not be cured by amendment. The revised code of Iowa, enacted after these cases were decided, provides, in the chapter relating to attachments, that "this chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has or can be amended so as to show that a legal cause for the attachment exists at the time it was issued," etc. Under this section, the Iowa Supreme Court has held that a writ of attachment sealed with the wrong seal, may be amended by attaching the proper seal: *Murdough* v. *McPherrin*, 49 Iowa, 479. See *Magoon* v. *Gillett*, 54 Id. 55.

The New York code provides that "the court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case," etc. This was considered broad enough to allow a seal, omitted in issuing a writ of attachment, to be supplied: *Talcott* v. *Rosenberg*, 8 Abb. Pr. (N. S.) 287.

A mere scroll used by the notary for a seal, is not a sufficient authentication of an affidavit for a writ of attachment: *Hinckley* v. *O'Farrel*, 4 Blackf. 185. That such an affidavit cannot be amended under the *usual* statutes allowing amendment of pleadings, it has been held, in *Watt* v. *Carnes*, 4 Heisk. 532. But see *supra*.

Although somewhat out of order, we may state that in *Maloney* v. *Woodin*, 11 Hun, 202, the seal of a surrogate was affixed pending the trial.

Warrants. In *Hunter* v. *The Burnsville Turnpike Company*, 56 Ind. 213, it was said, in referring to the right to attach the seal to an execution after sale, "So, too, a sheriff who arrests a party on criminal process, perfect in all respects except the seal, would be liable to an action of trespass, unless the defect could be amended." In *Dominick* v. *Eacker*, 3 Barb. 17, a sheriff was sued in trespass for arresting the plaintiff under process to which the seal of the wrong court was affixed, which was held by the court to be equivalent to having no seal affixed. But it was held, that the process was amendable, and that the defendant could justify under it.

Other cases hold that a warrant without the seal is void, and the officer holding it acts at his peril; and if killed in making the arrest by the person he is endeavoring to arrest, the offense is only manslaughter, the same as if an arrest was attempted without a warrant, where the person resisting was not guilty of an offense: *Tackett* v. *State*, 3 Yerg. 392; *Bell* v. *Farnsworth*, 11 Humph. 609. See *Galvin* v. *State*, 6 Coldw. 291.

Writ of error. A writ of error issued without the seal of the court issuing it is void: *Overton* v. *Cheek*, 22 How. 46. Such a writ cannot be amended by attaching the seal, even though it had been placed within the proper clerk's office within the required time: *Mayor, etc., of Washington* v. *Dennison*, 6 Wall. 495. So on appeal, if the transcript have not the seal of the court below, the appeal will be dismissed: *Jones* v. *Frost*, 42 Ind. 543; *Hinton* v. *Brown*, 1 Blackf. 429; *Sanford* v. *Sinton*, 34 Ind. 539; *Vanliew* v. *State*, 10 Id. 384.

W. W. THORNTON.

Crawfordsville, Ind.